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JURISDICTIONAL STATEMENT

Defendant-Appellant City of St. Louis appeals from a judgment in the amount of Eight Million Two Hundred Fifty-Nine Thousand Seven Hundred Fifty-Seven Dollars and 30/100 ($8,259,757.30) rendered against it in an action for damages to real and personal property owned by Plaintiff-Respondent Junior College District of St. Louis. The instant appeal was transferred by the Missouri Court of Appeals pursuant to Rule 83.02.

STATEMENT OF FACTS

Plaintiff Junior College District filed the action below against Defendant City of St. Louis seeking damages for the loss of property caused by flooding which occurred at the Plaintiff's Forest Park campus on October 23, 1997, as a result of a broken water service pipe, the fire line, owned by Plaintiff College. The fire line is an eight-inch diameter water line exclusively servicing the fire suppression system for the College's campus. (Stipulation, ¶10, L.F. 32-33.) Plaintiff did not contend that Defendant City was liable for causing its fire line to rupture. Liability was asserted because the City in 1987 repaved Oakland Avenue and as part of that resurfacing project, the manhole cover permitting access to the Plaintiff's shutoff valve for the ruptured water line was paved over and was therefore not readily visible when employees of Plaintiff College and Defendant City attempted to shut off the College's shutoff valve. Plaintiff sought damages from the City for the increased damage caused to its property as a result of the delay of several hours in finally discovering the location of the shut off valve.

Plaintiff's petition was in three counts. In count I, Plaintiff College alleged negligence by Defendant City in the following respects:

A. in failing to maintain the shut off valve and box for the broken supply line in a visible and accessible condition;

B. in failing to mark the existence and location of the shut off valve at that location;

C. in paving over the shut off valve and valve box for the broken supply line;

D. in negligently failing to properly train its employees to locate shut off valves and to stop the flow of water to a broken supply line;

E. in negligently failing to isolate the ruptured supply line when the direct shut off valve for the supply line was not located;

F. in negligently failing to prevent the uncontrolled flow of water from the City's main line onto Plaintiff's property.

(Petition, ¶15, L.F. 13)

In count II, Plaintiff alleged that Defendant City was negligent in failing to comply with the provisions of its own ordinance, §23.04.185 of the Revised Code, which was in effect on October 23, 1997, and which provided:

23.04.185 Stop boxes over shut off valves - Accessibility.

Notwithstanding the provision of any other ordinance, the Water Division with funds from the Water Division shall, by contract or otherwise, expose, make street level, and make accessible stop boxes over shut off valves whenever the City of St. Louis, by contract or otherwise, is responsible for covering said stop boxes during street repair or resurfacing.

(Petition, ¶20, L.F. 14)

In count III, Plaintiff alleged negligence by Defendant City in the following respects:

A. failing to maintain accurate drawings and plans showing the location of the shut off valves and boxes and the water supply lines that they control, including the supply lines and shut off valves to the Forest Park campus;

B. failing to identify on the drawings valves and boxes that the City had paved over, including the shut off valve for the broken supply line;

C. failing to equip Water Department and other City employees sent to the Forest Park campus in response to the flood with accurate copies of the drawings and plans;

D. failing to train its employees to read and interpret the drawings and plans to locate the shut off valve and box for the broken supply line;

E. otherwise failing to act so that accurate plans and drawings were available to locate the supply line shut off valve and box which the City had paved over.

Petition, ¶24 (L.F. 15-16).

The trial court sustained Defendant City's motion to dismiss count II of Plaintiff's petition and that count is not at issue in this appeal. (L.F. 22). In its amended answer filed as to the remaining counts, Defendant City raised as affirmative defenses (1) that Defendant was immune from suit pursuant to §537.600 R.S.Mo.; (2) that Defendant was immune from suit under the public duty doctrine; (3) that Plaintiff's petition failed to state a claim upon which relief could be granted; (4) that Plaintiff's own negligence was the total cause of or substantially contributed to Plaintiff's injuries and that if any amount should be awarded to Plaintiff, it should be reduced proportionately to the amount of its negligence; (5) that Plaintiff's damages, if any, were limited pursuant to §537.610 R.S.Mo.; and (6) that Plaintiff's claim was barred by the statute of limitations. Affirmative Defenses, ¶¶1, 2, 3, 4, 5, 6 (L.F. 27).

The parties submitted the case to the trial court upon a stipulation of facts, (L.F. 29-42), summarized below.

On October 23, 1997, one of the principal water service lines supplying the campus ruptured. This service line, the fire line, was owned by the Junior College District and did not supply any user other than the Forest Park campus. (Stipulation, ¶4, L.F. 30). The fire line was connected to the City's main water line that runs under Oakland Avenue. (Id.). When the water was observed, employees of the Junior College District accessed and closed all of the shut off valves coming off of the City's main line which they could find. (Id.). The shut off valve for the ruptured fire line was not closed because the manhole cover permitting access to this valve had been paved over by the City's Street Department in 1987 so that it was not readily visible. (Id.). (It is unclear from the record whether the manhole cover was visible prior to 1987.) Employees of the City's Water Department appeared promptly when called, but were unable to ascertain the existence and location of the necessary shut off valve for several hours. (Id.).

When the College was constructed, the College received water from lines connected to the City's main water line under Oakland Avenue. (Stipulation, ¶10, L.F. 32-33). Two parallel supply lines, approximately 6 feet apart, serviced the college campus. (Id.). One of these was a supply main ("supply line") and the other a fire suppression line (“fire line"). (Id.). Both of these lines are owned by the Junior College District. (Id.). The City issued permits for the Junior College District to install valves which controlled the flow of water into the College's lines. (Id.). These valves were installed within underground concrete

valve boxes located on the northern edge of Oakland Avenue. (Id.). The concrete valve boxes were within six feet of each other, and were covered by manhole covers, which had to be removed in order to gain access to the shut off valves. (Id.). (Stipulation, ¶¶10, 11; L.F.32-33).

At some time after construction of the college, but before 1987, the City widened Oakland Avenue, so that the manhole covers permitting access to the shut off valves for the College's main supply and fire lines were located within the street right of way. (Stipulation, ¶13, L.F. 34). It is unknown whether the manhole covers were flush with the street level at that time. (Id.).

When the City Street Department repaved Oakland Avenue in 1987, it raised the grade of the pavement. (Stipulation, ¶14, L.F. 34). The height of the manhole cover providing access to the College's main supply line was raised so that it was flush with the street. (Stipulation, ¶15, L.F. 34-35). It is not known who raised the height of this manhole cover. (Id.). At the time, City Ordinance 23.12.010 made it the responsibility of Plaintiff as the owner of the supply line to make the manhole cover visible and accessible. (Stipulation, ¶18, L.F. 35).

Neither the City nor the College raised the height of the manhole cover for the stop box permitting access to the College's fire line. (Stipulation, ¶14, L.F. 34). At the time, City Ordinance 23.12.010 made it the responsibility of Plaintiff as the owner of the fire line to make it visible and accessible. (Stipulation, ¶18, L.F. 35). The Street Department paved over the manhole cover permitting access to the fire line, and did not notify the City's

Water Department or the College that it had done so. (Stipulation, ¶15, L.F. 34). Neither did the Street Department nor the Water Division mark the location of the manhole cover for the fire line on Oakland Avenue. (Id.). From 1987 through October 23, 1997, neither the City's Water Division nor the College took any action to maintain the stop box or shut off valve for the College's fire line, or to uncover or mark the location of the stop box or manhole cover. (Stipulation, ¶22, L.F. 37).

At the time of the widening of Oakland Avenue and at the time of the 1987 repaving of Oakland, the City had in full force and effect the following ordinance provisions (cited by Code section), which have never been repealed:

> **23.12.010 Repair required**.
>
> Stop boxes over the shut off valves on all service pipes must be kept in repair, exposed and accessible at all times by the agent, owner or occupant of the premises supplied by such service pipes. (Ord. 48646 § 11 (part), 1958: 1948 C. Ch. 55 § 24 (part): 1960 C. § 551.010.).
>
> **23.12.020 Notice to repair**.
>
> Whenever a stop box or shut off valve is found by the water commissioner to be broken, in need of repairs, covered up or in any way inaccessible, he shall notify the agent, owner or occupant to repair, locate or uncover the stop box or shut off valve within five days. Failure by the agent, owner or occupant to comply with such notice shall be sufficient to warrant for the water commissioner to excavate and shut off the water at the curb or at the main, in

his discretion. (Ord. 48646 §11 (part), 1958: 1948 C. Ch. 55 § 24 (part): 1960 C. § 551.020.).

23.12.030 Reconnection.

Permission for the use of water for premises supplied from such tap shall not be granted, nor shall the water be turned on at the tap until the stop box or shut off valve is repaired and placed in a condition satisfactory to the water commissioner and the total expense of excavating, disconnecting and reconnecting the service pipe and of replacing the street pavement is paid. (Ord. 48646 § 11 (part), 1958: ; 1948 C. Ch. 55 § 24 (part): 1960 C. § 551.030.).

(Stipulation, ¶18, L.F. 35-36).

On January 13, 1993, the City adopted an ordinance (cited by Code section) which provides as follows:

23.04.185 Stop boxes over shut off valves - Accessibility.

Notwithstanding the provision of any other ordinance, the Water Division with funds from the Water Division shall, by contract or otherwise, expose, make street level, and make accessible stop boxes over shut off valves whenever the City of St. Louis, by contract or otherwise, is responsible for covering said stop boxes during street repair or resurfacing. (Ord. 62836 § 1, 1993.).

(Stipulation, ¶16, L.F. 35).

On October 23, 1997, the College's fire line ruptured. (Stipulation, ¶23, L.F. 37). Employees of the College went to Oakland Avenue to shut off the water to the campus. (Id.). These employees observed the supply line manhole cover, but not the fire line manhole cover which had been paved over. (Stipulation, ¶24, L.F. 37-38). They closed the shut off valve for the supply line, but not the fire line. (Id.).

The College possessed a set of engineering drawings showing the layout of its water lines and shut off valves including the shut off valve to the ruptured fire line. However, the College stored those drawings in its basement, which was inaccessible due to the flood. (Stipulation, ¶25, L.F. 38). Employees of the Water Division were called to the scene and arrived at approximately 3:25 p.m. with copies of those same engineering drawings. (Id.). The College's employees closed all of the other accessible valves for water lines leading to the campus. (Id.). But since the ruptured fire line valve was not closed, the flooding continued. (Id.). At approximately 5:00 p.m., the City's Water Division employees had to respond to a unrelated call of a water main break. (Id.). They took their engineering drawings with them to that call. (Id.). At the time the City's Water Division left to respond to this other call, neither they nor employees of the College recognized the existence or location of the concealed valve which controlled the ruptured fire line. (Id.).

City Water Division employees returned to the Forest Park campus at approximately 6:30 p.m., after having completed their work on the unrelated water main break. (Stipulation, ¶26, L.F. 38-39). They again had their engineering drawings. (Id.).

At approximately 8:00 p.m., employees of the City, the College and a private

plumbing contractor hired by the College located the concealed valve for the ruptured fire line through the use of the engineering drawings and a flow meter supplied by the City's Water Division. (Stipulation, ¶27, L.F. 39). Employees of the private plumbing contractor broke up the pavement to reveal the stop box and employees of the College and the contractor then gained access to the valve box and closed the shut off valve, ending the flooding. (Id.).

If the valve to the fire line had been located and closed at or about 3:20 p.m., as it would have if it had not been paved over, then the College's flood damage would have been $1,005,506. (Stipulation, ¶29, L.F. 39-40). In fact, the College's total damage resulting from the flood was $6,830,667. (Id.). The College suffered an additional $5,825,161 in damages as a result of the continued flow of water from 3:20 p.m. to 8:30 p.m. (Id.).

On June 14, 2002, the trial court rendered its Order and Judgment awarding damages in favor of Plaintiff and against Defendant in the principal amount of $5,825,161.00 together with interest from October 23, 1997 to the date of Judgment in the amount of $2,434,596.30, for a total of $8,259,757.30. (L.F. 45-56). The trial court made no finding as to any contributory negligence by Plaintiff and made no apportionment of damages. Defendant City then filed its notice of appeal. (L.F. 57-60).

On September 9, 2003, the Missouri Court of Appeals for the Eastern District issued its opinion and simultaneously transferred the case to this Court pursuant to Missouri Supreme Court Rule 83.02. The Court of Appeals in a 2-1 majority opinion concluded that the City owed no duty to the Plaintiff that would establish the City's liability

for the 1997 flood. The Honorable George W. Draper III issued a dissenting opinion.

POINTS RELIED ON

I

THE TRIAL COURT ERRED IN RENDERING JUDGMENT IN FAVOR OF PLAINTIFF AND AGAINST DEFENDANT ON PLAINTIFF'S CLAIM OF NEGLIGENCE BECAUSE DEFENDANT DID NOT OWE A DUTY TO PLAINTIFF TO MAINTAIN THE SHUT OFF VALVE SO THAT IT WOULD BE VISIBLE AND ACCESSIBLE OR TO MARK THE LOCATION OF THE SHUT OFF VALVE AT THAT LOCATION IN THAT AT THE TIME OAKLAND AVENUE WAS REPAVED AND PLAINTIFF'S FIRE LINE VALVE BOX WAS NOT RAISED TO THE GRADE OF THE REPAVED STREET, CITY ORDINANCE 23.12.010 MADE IT THE OBLIGATION OF PLAINTIFF AS THE OWNER OF THE VALVE BOX TO MAKE SURE THAT IT WAS VISIBLE AND ACCESSIBLE AND THE SUBSEQUENT ENACTMENT OF CITY ORDINANCE 23.04.185 MAKING IT THE OBLIGATION OF THE CITY TO MAKE SURE THAT VALVE BOXES ARE VISIBLE AND ACCESSIBLE AFTER REPAVING CANNOT BE APPLIED RETROACTIVELY.

DOE V. ROMAN CATHOLIC DIOCESE, 862 S.W.2D 338 (MO. BANC 1993)

JONES V. MO. DEPT. OF SOC. SERV., 966 S.W.2D 324 (MO. APP. E.D. 1998)

HOSKINS V. BOX, 54 S.W.3D 736 (MO. APP. W.D. 2001)

II

THE TRIAL COURT ERRED IN RENDERING JUDGMENT IN FAVOR OF PLAINTIFF AND AGAINST DEFENDANT ON PLAINTIFF'S CLAIM OF NEGLIGENCE BECAUSE DEFENDANT WAS PROTECTED FROM LIABILITY UNDER THE PUBLIC DUTY DOCTRINE IN THAT ANY OBLIGATION OF DEFENDANT CITY TO MAINTAIN PLAINTIFF'S FIRE LINE SHUT OFF VALVE SO THAT IT WOULD BE VISIBLE AND ACCESSIBLE, TO MARK THE LOCATION OF THE SHUT OFF VALVE AT THAT LOCATION, TO RESPOND AT THE SCENE, OR TO TRAIN DEFENDANT'S EMPLOYEES SO THEY COULD LOCATE AND ACCESS CONCEALED SHUT OFF VALVES WAS A DUTY THAT DEFENDANT OWED TO THE GENERAL PUBLIC, NOT TO PLAINTIFF INDIVIDUALLY.

JUNGERMAN V. CITY OF RAYTOWN, 925 S.W.2d 202 (MO. BANC 1996)

CLAXTON V. CITY OF ROLLA, 900 S.W.2D 635 (MO. APP. S.D. 1995)

GWT-PAT, INC. V. MEHLVILLE FIRE PROTECTION DISTRICT, 801 S.W.2D 798 (MO. APP. E.D. 1991)

III

THE TRIAL COURT ERRED IN RENDERING JUDGMENT IN FAVOR OF PLAINTIFF AND AGAINST DEFENDANT ON PLAINTIFF'S CLAIMS OF NEGLIGENCE BECAUSE THERE WAS NO EVIDENCE PRESENTED THAT DEFENDANT'S WATER DIVISION EMPLOYEES WHO RESPONDED TO THE SCENE WERE INADEQUATELY TRAINED OR EQUIPPED OR THAT THEY OR THE CITY PERFORMED ANY NEGLIGENT ACTS IN CONNECTION WITH THEIR RESPONSE AT THE SCENE, OR THAT SUCH TRAINING OR EQUIPMENT OR ACTS WERE THE PROXIMATE CAUSE OF CONTINUED FLOODING AT PLAINTIFF'S PROPERTY.

GREEN V. DENISON, 738 S.W.2D 861 (MO. BANC 1987)

PEOPLES V. CONWAY, 897 S.W.2D 206 (MO. APP. E.D. 1995)

IV

THE TRIAL COURT ERRED IN RENDERING JUDGMENT IN FAVOR OF PLAINTIFF AND AGAINST DEFENDANT CITY OF ST. LOUIS IN EXCESS OF $100,000.00 BECAUSE PLAINTIFF'S CLAIM, IF ANY, AROSE OUT OF THE ALLEGEDLY DEFECTIVE CONDITION OF DEFENDANT CITY'S PROPERTY, I.E., THAT PORTION OF OAKLAND AVENUE WHERE PLAINTIFF'S FIRE LINE STOP BOX WAS LOCATED, AND PURSUANT TO SECTION 537.610 R.S.MO. 1994, PLAINTIFF'S DAMAGES WERE LIMITED TO $100,000.00.

WOLLARD V. CITY OF KANSAS CITY, 831 S.W.2D 200 (MO. BANC 1992)

V

THE TRIAL COURT ERRED IN RENDERING JUDGMENT AGAINST DEFENDANT FOR THE FULL AMOUNT OF PLAINTIFF'S DAMAGES AND NOT APPORTIONING FAULT BETWEEN THE PARTIES IN THIS CASE BECAUSE THE FACTS AS STIPULATED DEMONSTRATED AS A MATTER OF LAW THAT PLAINTIFF WAS GUILTY OF CONTRIBUTORY NEGLIGENCE IN THAT THE RUPTURE OF THE COLLEGE'S OWN FIRE LINE WAS A PROXIMATE CAUSE OF ITS DAMAGE AND IN THAT THE COLLEGE HAD A DUTY UNDER SECTION 23.12.010 OF THE CITY ORDINANCES TO RAISE THE LEVEL OF ITS FIRE LINE VALVE BOX TO THE GRADE OF THE STREET AT THE TIME OF THE 1987 REPAVING OF OAKLAND AVENUE BUT FAILED TO DO SO.

GUSTAFSON V. BENDA, 661 S.W.2D 11 (MO. BANC 1983)

VI

THE TRIAL COURT ERRED IN RENDERING JUDGMENT IN FAVOR OF PLAINTIFF AND AGAINST DEFENDANT WHICH INCLUDED PREJUDGMENT INTEREST BECAUSE PLAINTIFF'S CLAIM WAS FOUNDED ON THE TORT OF NEGLIGENCE AND AS A GENERAL RULE, MISSOURI LAW DOES NOT AUTHORIZE AN AWARD OF PREJUDGMENT INTEREST IN TORT CASES AND PLAINTIFF DID NOT COME UNDER ANY EXCEPTION TO THAT GENERAL RULE IN THAT (1) PLAINTIFF FAILED TO SHOW THAT DEFENDANT'S CONDUCT CONFERRED A BENEFIT UPON DEFENDANT AND (2) PLAINTIFF DID NOT COMPLY WITH THE STATUTORY REQUIREMENTS OF SECTION 408.040(2) R.S.MO. SO AS TO BE ENTITLED TO PREJUDGMENT INTEREST IN THIS CASE IN THAT IT FAILED TO MAKE A WRITTEN SETTLEMENT OFFER, IN A CERTAIN OR READILY ASCERTAINABLE AMOUNT, BY CERTIFIED MAIL.

EMERY V. WAL-MART STORES, INC., 976 S.W.2D 439 (MO. BANC 1998)

SANDERS V. HARTVILLE MILL. CO., 14 S.W.3D 188 (MO. APP. S.D. 2000)

ARGUMENT

Introduction

Defendant City of St. Louis appeals from a judgment in the amount of $8,259,757.30 rendered against it and in favor of Plaintiff Junior College District in the underlying action for negligence. The case was submitted to the court without a jury based upon a stipulation of facts. (L.F. 29-42). On appeal, Defendant contends that the trial court erred in rendering judgment in favor of Plaintiff because: (1) Defendant City owed no duty to Plaintiff to make Plaintiff's fire line valve box visible and accessible because at the time Oakland Avenue was repaved in 1987, City Ordinance 23.12.010 made this the responsibility of Plaintiff as the owner of the pipes and premises served by them and Plaintiff failed to comply with the provisions of the ordinance; (2) Defendant City was protected from liability under the public duty doctrine; (3) Plaintiff failed to produce any evidence in support of its claim that Defendant City's training program for its Water Department employees was inadequate or that it or its employees performed any negligent acts in connection with their response at the scene of the College; and (4) that Plaintiff's claim arose out of the allegedly defective condition of Defendant's property and therefore that Plaintiff's damages were limited to $100,000. Assuming, arguendo, that Defendant City is not entitled to judgment in its favor outright, Defendant contends that the trial court should have apportioned fault in this case and consequently reduced the amount of damages awarded to Plaintiff because the evidence established that Plaintiff's own service line rupture was the proximate cause of the flooding and because Plaintiff was negligent in

failing to make its fire line valve box visible and accessible as required by City Ordinance 23.12.010 in effect at the time of the 1987 repaving as well as in failing to access its own drawings or otherwise apprize itself of the whereabouts of its own stop box and valve, and that such negligence was also a proximate cause of Plaintiff's injury. Finally, assuming arguendo that Plaintiff is entitled to any amount of damages in this case, the trial court erred in awarding Plaintiff prejudgment interest because this is a tort action and Plaintiff did not comply with the statutory provisions of §408.040(2) R.S.Mo. regarding the award of prejudgment interest in tort cases.

Generally, an appellate review of the trial court's decision in a court-tried case is governed by the standard set forth in Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976), i.e., the reviewing court will sustain the judgment of the trial court unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. However, where an action is submitted to the trial court on stipulated facts, the only question for the Court on review is whether the trial court drew the proper legal conclusion from the facts stipulated. Sheldon v. Board of Trustees, 779 S.W.2d 553, 554 (Mo. banc 1989); Schroeder v. Horack, 592 S.W.2d 742, 744 (Mo. banc 1979); State ex rel Gateway Green Alliance v. Welch, 23 S.W.3d 861,863 (Mo. App. E.D. 2000); Housing Authority of St. Louis County v. Boone, 747 S.W.2d 311, 313 (Mo. App. E.D. 1988).

In this case, an appellate argument is made difficult because the trial court's decision does not specify precisely what Defendant City did or did not do that constitutes negligence

for which the City has been held liable. That is, the City does not know the specific act or omission for which it was held liable. This issue becomes important because Defendant City is protected from liability in this case for different reasons, depending upon the grounds of negligence alleged. Plaintiff, in the "Stipulation" argued to the trial court, asserted the City was negligent in three ways:

> [T]he College asserts that the City Water Division had a duty to maintain the shut-off valve so that it was both visible and accessible, that the City Water Division had a duty to otherwise mark the existence and location of the shut-off valve at its location, and that the City Water Division had a duty to properly train and equip its employees to locate, access, and operate shut-off valves so as to reduce the damages suffered by the City's water customers from flooding resulting from the rupture of underground water lines.

(Stipulation, ¶5, L.F. 31). Accordingly, Defendant City's arguments in its opening brief focus on countering these three allegations of negligence; Defendant City also contends that there was no evidence presented to the trial court to support any of the other allegations of negligence contained in Plaintiff's petition.

I

THE TRIAL COURT ERRED IN RENDERING JUDGMENT IN FAVOR OF PLAINTIFF AND AGAINST DEFENDANT ON PLAINTIFF'S CLAIM OF NEGLIGENCE BECAUSE DEFENDANT DID NOT OWE A DUTY TO PLAINTIFF TO MAINTAIN THE SHUT OFF VALVE SO THAT IT WOULD BE VISIBLE AND ACCESSIBLE OR TO MARK THE LOCATION OF THE SHUT OFF VALVE AT THAT LOCATION IN THAT AT THE TIME OAKLAND AVENUE WAS REPAVED AND PLAINTIFF'S FIRE LINE VALVE BOX WAS NOT RAISED TO THE GRADE OF THE REPAVED STREET, CITY ORDINANCE 23.12.010 MADE IT THE OBLIGATION OF PLAINTIFF AS THE OWNER OF THE VALVE BOX TO MAKE SURE THAT IT WAS VISIBLE AND ACCESSIBLE AND THE SUBSEQUENT ENACTMENT OF CITY ORDINANCE 23.04.185 MAKING IT THE OBLIGATION OF THE CITY TO MAKE SURE THAT VALVE BOXES ARE VISIBLE AND ACCESSIBLE AFTER REPAVING CANNOT BE APPLIED RETROACTIVELY.

Plaintiff College has attempted in a variety of ways to cast the alleged negligence in this case as a failure on the part of the City's Water Division to perform a duty in connection with a proprietary function. In part, Plaintiff casts this alleged duty as one "to maintain [Plaintiff's] shut off valve so that it was both visible and accessible" and also "to mark the existence and location of [Plaintiff's] shut off valve." However, the relevant ordinances belie that this was the City's duty. Rather, by the express ordinance language, it was the Plaintiff College's duty.

As the stipulation of the parties makes clear, when the City's Street Department repaved Oakland Avenue in 1987, the grade of the street was raised. At that time while the supply line box was raised, the fire line stop box was not raised, and it was paved over. (Stipulation, ¶15, L.F. 34-35). It is unknown whether, immediately prior to the repaving in 1987, the fire line stop box was visible or not. But whether this manhole cover first became paved in 1987 or at some earlier time after construction of the College, it is clear under the law in effect at the time that it was the responsibility of the College, and not the City, to make sure it was visible and accessible.

The parties stipulated that since at least 1960 (prior to the construction of the College) up through the date of the hearing, the City ordinances included the following provisions:

> **23.12.010 Repair required**.
>
> Stop boxes over the shut off valves on all service pipes must be kept in repair, exposed and accessible at all times by the agent, owner or occupant of the premises supplied by such service pipes. (Ord. 48646 § 11 (part), 1958: 1948 C. Ch. 55 § 24 (part): 1960 C. § 551.010.).
>
> **23.12.020 Notice to repair**.
>
> Whenever a stop box or shut off valve is found by the water commissioner to be broken, in need of repairs, covered up or in any way inaccessible, he shall notify the agent, owner or occupant to repair, locate or uncover the stop box or shut off valve within five days. Failure by the agent, owner or occupant to

comply with such notice shall be sufficient to warrant for the water commissioner to excavate and shut off the water at the curb or at the main, in his discretion. (Ord. 48646 §11 (part), 1958: 1948 C. Ch. 55 § 24 (part): 1960 C. § 551.020.).

23.12.030 Reconnection.

Permission for the use of water for premises supplied from such tap shall not be granted, nor shall the water be turned on at the tap until the stop box or shut off valve is repaired and placed in a condition satisfactory to the water commissioner and the total expense of excavating, disconnecting and reconnecting the service pipe and of replacing the street pavement is paid. (Ord. 48646 § 11 (part), 1958: ; 1948 C. Ch. 55 § 24 (part): 1960 C. § 551.030.).

(Stipulation, ¶18, L.F. 35-36). These sections make it clear that it is the duty of the owner of the premises supplied by the service pipes - in this case, the College - to make sure that the stop box is kept "exposed and accessible." The parties' stipulation makes it clear that the College did not comply with this mandate with respect to its fire line stop box.[1] (Stipulation, ¶14, L.F. 34).

Approximately six years after Plaintiff's fire line stop box was buried beneath the

[1]The Stipulation indicates that the companion supply line stop box was raised following the 1987 repaving, but it is not known who did so. (Stipulation, ¶15, L.F. 34-35)

repaved Oakland Avenue (assuming it had not already been buried earlier when the street was widened) the City adopted a new ordinance dealing with access to stop boxes when road work is performed:

> **23.04.185 Stop boxes over shut off valves - Accessibility**.
>
> Notwithstanding the provision of any other ordinance, the Water Division with funds from the Water Division shall, by contract or otherwise, expose, make street level, and make accessible stop boxes over shut off valves whenever the City of St. Louis, by contact or otherwise, is responsible for covering said stop boxes during street repair or resurfacing. (Ord. 62836 § 1, 1993.).

(Stipulation, ¶16, L.F. 35). Under this ordinance, it then became the duty of the City's Water Division to ensure that access to stop boxes remained possible after road work was performed. The question is, should this ordinance be given retrospective application so that it then became the City's responsibility to go back and raise the level of all stop boxes which had not been raised by the owner (as required by ordinance at the time) as part of previous road improvement projects? The answer under Missouri law is clearly "no."

As a general rule, statutes operate prospectively. Department of Social Services v. Villa Capri Homes, Inc., 684 S.W.2d 327, 332 (Mo. banc 1985); St. Louis County v. University City, 491 S.W.2d 497, 499 (Mo. banc 1973). Missouri Const. Art. I, Section 13 prohibits the enactment of any law that is "retrospective in its operation." Retrospective laws are generally defined as laws which "take away or impair rights acquired under existing

laws, or create a new obligation, impose a new duty, or attach a new disability in respect to transactions or considerations already past." Doe v. Roman Catholic Diocese, 862 S.W.2d 338, 340 (Mo. banc 1993); See also, Mendelsohn v. State Board of Registration for the Healing Arts, 3 S.W.3d 783, 785-786 (Mo. banc 1999). The general principle that legislation operates prospectively applies equally to ordinances. See, e.g., Krekeler v. St. Louis County Bd. of Zoning Adjustment, 422 S.W.2d 265, 270 (Mo. 1967); Fleming v. Moore Bros. Realty Co., Inc., 251 S.W.2d 8, 16 (Mo. 1952).

There are two recognized exceptions to the general rule that legislative enactments shall not be applied retrospectively: (1) where the legislative intent that they be given retroactive operation clearly appears from the express language of the act or (2) the legislation is solely procedural or remedial and does not affect the substantive rights of the parties. Jones v. Mo. Dept. of Soc. Serv., 966 S.W.2d 324, 327 (Mo. App. E.D. 1998); Hoskins v. Box, 54 S.W.3d 736, 739 (Mo. App. W.D. 2001). As the Supreme Court observed in Doe v. Roman Catholic Diocese, 862 S.W.2d at 341, a legislative declaration that an enactment is to be given retrospective effect cannot supercede a constitutional provision like Mo. Const. Art. I, §13. But nothing in Section 23.04.185 of the City Ordinances indicates that it was intended to be given retroactive application. Moreover, the Courts have stated that a legislative body must use clear language in order to give a law retroactive effect, Jones v. Mo. Dept. Soc. Serv., supra; Hoskins v. Box, supra, and the ordinance at issue certainly does not contain any such clear language.

While legislation that is remedial or affects only procedure can be given retroactive

application, §23.04.185 of the City Ordinances is clearly a substantive provision because it is one that "creates a new obligation, imposes a new obligation, imposes a new duty, or attaches a new disability to a past transaction." Jones v. Mo. Dept. Soc. Serv., 966 S.W.2d at 328. See also Hoskins v. Box, 54 S.W.3d at 739. Here, Plaintiff College seeks to apply the provisions of §23.04.185 of the City Ordinance to impose upon Defendant City a new obligation or duty - to raise the level of the stop box - a duty that under the pre-existing ordinance, §23.12.010, had belonged to Plaintiff College alone. Hence, §23.04.185 cannot be applied retroactively to impose upon the City's Water Division from and after January, 13, 1993, a duty which had previously belonged to Plaintiff and which Plaintiff failed to perform when it was required by law to do so.[2]

Given that it was Plaintiff College's duty to make its fire line stop box visible and accessible in 1987 and it failed to do so, what duty did Defendant City have thereafter to make it visible and accessible or to mark its location so that it could be accessed? It should be remembered at all times that the stop box itself was Plaintiff College's property, not the City's, and the fire line that ruptured was similarly the property of the College, and not the property of Defendant City. The College installed the boxes and had received a City work

[2]Neither can anything found in the Foreman's Manual (Stipulation Exh., L.F. 41-42), be deemed applicable to the facts of this case. That document demonstrates on its face that it did not became applicable until May, 1990, again, after the date of the 1987, and Plaintiff's failure to comply with the requirements of §23.12.010 of the City Code.

permit to do so. The College possessed a map showing the location of all its valves and boxes. The College, and not the City, was in a superior position to know the location of the College's valves and boxes and to maintain their accessibility.

At best, Plaintiff's claim is that Defendant City failed to enforce its ordinances, specifically, §23.12.020 of the City Code, to require Plaintiff College to make **its** stop box visible and accessible. But such activity - enacting and enforcing the City's ordinances - is a governmental function for which the City enjoys sovereign immunity, and is not the basis of Plaintiff's claim. See Bean v. City of Moberly, 169 S.W.2d 393, 397 (Mo. 1943); Von Der Haar v. City of St. Louis, 226 S.W.2d 376, 380 (Mo. App. E.D. 1950). See also Christine H v. Derby Liquor Store, 703 S.W.2d 87, 89 (Mo. App. E.D. 1985) and Berger v. City of University City, 676 S.W.2d 39, 41-42 (Mo. App. E.D. 1984), holding that no liability attaches for failure to enforce a city's own ordinances in such instances under the public duty doctrine, discussed in greater detail in point II hereof.

Plaintiff had a duty to maintain the accessibility of its stop box and failed to do so. It was not Defendant City's duty to do so at the time of the 1987 repaving nor did it become the City's duty to do so thereafter. The trial court erred in finding that the City had a duty to maintain the visibility and accessibility of Plaintiff's stop box and valve or to mark its location.

Further, R.S. Mo. §82.190, which provides the City with “exclusive control over its public highways, streets, avenues, alleys and public places” does not negate the foregoing analysis.

The College obtained a permit to install its stop boxes in the City's right of way. (Stipulation, ¶10, L.F. 33.) There is nothing in Section 82.190 which would have prohibited the College from doing further work on its stop boxes or maintaining their visibility and accessibility. If the College believed it needed a permit for any work in connection with maintaining or accessing its valves and boxes, there is nothing to indicate that it could not have obtained one. It is not unusual that a private property owner's activities to maintain its property may involve the need to obtain City permission for its work. In any event, the College made no contention that it was in any way prohibited from maintaining the accessibility of or tracking the location of its valves and box. Rather, it simply failed to do so. It is not known whether the stop box was "concealed" prior to the 1987 repaving. At a minimum, the College went for ten years without any concern over the visibility of the box.

Next, it is important to note that the Plaintiff College has made no claim that the City owed it any duty by virtue of any contractual, easement or franchise-type rights. Rather, this is a tort case and the Plaintiff is unable to show that anyone besides it had a duty to maintain its box and valve or keep track of its location. Nor does it claim it was unaware of the paving.

Finally, any public policy arguments to the contrary have been addressed by the City's 1993 legislation which now makes it the duty of the Water Division to raise privately owned stop boxes when streets are repaired or repaved. The public policy aspects of this matter have been addressed legislatively. But for at least 33 years, and probably much longer, the duty was on the private property owner to keep track of its own stop boxes and

valves. To hold that, despite the prior ordinance, the City did have a duty to maintain such stop boxes would be to now mandate that the City conduct a review of every single City street paved prior to 1993 to determine whether any stop boxes are located underneath. This would be an absurd and unduly harsh result. To the contrary, those who installed and own the stop boxes are in superior positions to know of their whereabouts.

II

THE TRIAL COURT ERRED IN RENDERING JUDGMENT IN FAVOR OF PLAINTIFF AND AGAINST DEFENDANT ON PLAINTIFF'S CLAIM OF NEGLIGENCE BECAUSE DEFENDANT WAS PROTECTED FROM LIABILITY UNDER THE PUBLIC DUTY DOCTRINE IN THAT ANY OBLIGATION OF DEFENDANT CITY TO MAINTAIN PLAINTIFF'S SHUT OFF VALVE SO THAT IT WOULD BE VISIBLE AND ACCESSIBLE, TO MARK THE LOCATION OF THE SHUT OFF VALVE AT THAT LOCATION, TO RESPOND AT THE SCENE, OR TO TRAIN DEFENDANT'S EMPLOYEES SO THEY COULD LOCATE AND ACCESS CONCEALED SHUT OFF VALVES WAS A DUTY THAT DEFENDANT OWED TO THE GENERAL PUBLIC, NOT TO PLAINTIFF INDIVIDUALLY.

Assuming, arguendo, that the provisions of Section 23.04.185 of the City Code apply in this case - notwithstanding the fact that its provisions were adopted six years after Plaintiff had neglected its duty to raise the level of its stop box - Defendant City is nonetheless not subject to civil liability for its alleged failure to abide the terms of its ordinance or other allegedly negligent acts under the public duty doctrine.

Sovereign immunity and the public duty doctrine are closely related. See, e.g., United Missouri Bank v. City of Grandview, 105 S.W.3d 890, 902, (Mo. App. W.D. 2003). The public duty doctrine provides that a public employee and the governmental entities that employ them may not be held civilly liable for the breach of a duty owed to the general public. Heins Implement Co. v. Missouri Highway & Transp. Comm'n, 859 S.W.2d 681 (Mo. banc 1993.) Green v. Denison, 738 S.W.2d 861, 866 (Mo. banc 1987). "[T]he public duty doctrine recognizes that the duties of public officers are normally owed only to the general public and that a breach of such a duty will not support a cause of action by an individual injured thereby." State ex rel Twiehaus v. Adolf, 706 S.W.2d 443, 445 (Mo. banc 1986). The public duty doctrine applies equally to the governmental body for whom the public officer works. Jungerman v. City of Raytown, 925 S.W.2d 202, 205 (Mo. banc 1996); Berger v. City of University City, 676 S.W.2d 39, 41 (Mo. App. E.D. 1984). Further, the abrogation of sovereign immunity (pursuant to §537.600 R.S.Mo.) in no way impliedly abrogated the public duty doctrine. Jungerman v. City of Raytown, 925 S.W.2d at 206; Beaver v. Gosney, 825 S.W.2d 870, 873 (Mo. App. W.D. 1992); Jackson v. City of Wentzville, 844 S.W.2d 585, 587 (Mo. App. E.D. 1993).

In a limited number of instances, a public officer may owe a duty to particular individuals when "the law imposes on the officer the performance of ministerial duties in which a private individual has a special, direct, and distinctive interest", so that the public duty doctrine does not shield the officer or the governmental entity from liability. See State ex rel Twiehaus v. Adolf, 706 S.W.2d at 445. But Missouri has not implemented the

"special duty exception" applied in other states. See Heins v. Missouri Hwy. & Transp. Com'n., 859 S.W.2d 681, 695 in which this Court declined to adopt a "special duty exception" to the public duty doctrine. See also Cooper v. Planthold, 857 S.W.2d 477, 479 (Mo. App. E.D. 1993); Berger v. City of University City, 676 S.W.2d 39, 41 (Mo. App. E.D. 1984).

Missouri case law is replete with examples of duties owed to the public at large. For example, the Court in Cooper held that the duty to secure property of an inmate was not one that was a special duty owed to the decedent prisoner, but one owed to the pubic in general. 857 S.W.2d at 479-480. In Beaver v. Gosney, 825 S.W.2d 870, 873 (Mo. App. W.D. 1992), the Court held that an action against a police officer for failure to secure an accident scene which resulted in a subsequent accident in which the plaintiff was injured was barred under the public duty doctrine because the duty of securing the accident scene is one owed to the public at large and not to the particular individual involved in the subsequent accident. In State ex rel Barthelette v. Sanders, 756 S.W.2d 536, 538 (Mo. banc 1988), this Court held that the public duty doctrine precluded a suit against a state park superintendent for negligence in failing to warn of dangers of swimming in a flooded river or in failing to close the area where plaintiffs' decedent drowned.

And, perhaps most closely related to the instant case, the duty of a fire department to suppress fires is one owed to the public at large. Lawhon v. City of Smithville, 715 S.W.2d 300 (Mo. App. W.D. 1986).

In its opinion below, the trial court devoted a substantial portion of its discussion to

an analysis of why sovereign immunity does not bar Plaintiff's action. Appeal from this analysis is difficult in that neither the Plaintiff nor the trial court specified the act or omission for which the City was held liable. But even if that liability was premised in part on acts or omissions relating to proprietary function, then the City may be protected under the public duty doctrine even where it does not clearly enjoy sovereign immunity. For example, in Claxton v. City of Rolla, 900 S.W.2d 635, 636 (Mo. App. S.D. 1995), the plaintiff claimed that Defendant City's fire department was guilty of negligence in failing to timely respond to the call for fire protection, failing to rescue plaintiff from a burning building, and in failing to adequately search the building before attempting to extinguish the fire. The Court held that even if the defendant City was not protected against these claims by sovereign immunity, plaintiff's petition was nevertheless properly dismissed for failure to state a claim for relief because under the public duty rule, the defendant city owed no duty to the plaintiff. It is noteworthy that the negligence alleged in Claxton was in the affirmative action taken by the defendant city's employees, not simply in their failure to respond. Thus, Claxton stands for the proposition that a governmental entity does not undertake an individual duty to a citizen once its employees arrive upon the scene in response to a call and begin to take action.

The Court of Appeals reached the same conclusion in GWT-PAT, Inc., v. Mehlville Fire Protection District, 801 S.W.2d 798 (Mo. App. E.D. 1991). In that case, the plaintiff claimed that Defendant fire district's employees improperly vented the fire in attempting to put out a fire in a building adjoining Plaintiff's, so that it spread to the Plaintiff's property.

In attempting to avoid the public duty doctrine, the plaintiff argued that Missouri had or should adopt an "affirmative acts" or "active negligence" exception to the public duty rule, so that active negligence, as opposed to passive negligence, should be sufficient to create liability against the governmental entity or its employees. The Court disagreed and affirmed the trial court's dismissal of the Plaintiff's petition, noting that Missouri has expressly rejected any "special duty" exception. 801 S.W.2d at 800. See also Berger v. City of University City, 676 S.W.2d at 41; Lawhon v. City of Smithville, 715 S.W.2d at 302. Similarly, in Lawhon, the Court affirmed the circuit court's judgment on the pleadings in favor of Defendant city, finding that no legal duty was owed to the Plaintiffs even though Plaintiffs alleged that the city's firefighters had committed an affirmative negligent act by applying water to a grease fire.

It is apparent from the facts of this case that, assuming arguendo that the City committed any negligent acts or omissions, those acts or omissions were in connection with a duty owed to the public at large.

Even if the City, rather than the College, had the duty to raise the fire line stop box to grade level or to mark its location, the pertinent act or omission was in the Street Department's paving of Oakland Avenue and failure to notify the Water Commissioner of the need, presuming the stop box was even apparent to the Street Department[3], to raise the

[3]Recall that it is unknown whether the stop box at issue was at or below grade level at the time of the 1987 re-paving.

stop box. Clearly the City's maintenance of its streets is a duty owed to the public at large. And, even if St. Louis City Code §23.04.185 is applied retroactively to the Water Commissioner, nothing in that ordinance indicates an intent to create a private cause of action in favor of the owner of the shut-off valve. See Berger v. City of University City, 676 S.W.2d at 42, recognizing that defendant city's failure to comply with the terms of its own ordinance does not create civil liability. See also Bean v. City of Moberly, 169 S.W.2d 393, 397 (Mo. 1943) (City's failure to observe requirements of its own ordinance does not give rise to liability even where such requirements may become standard of care so far as members of general public are concerned). The evidence is that the Street Department notified neither the College nor the Water Commissioner of the street repaving, and there is absolutely no indication of bad faith on the Street Department in its "failure" to do so.

While Plaintiff College has cast the alleged negligent acts in a number of ways, what those acts boil down to is a delay in stopping the flood caused by the College's pipe rupture. But what type of duty is a City's duty to stop a flood? Or to maintain equipment to stop a flood within minutes instead of hours? What type of duty is a City's "duty" to respond to the scene and immediately locate and turn off the College's fire line valve? How are these "duties", assuming arguendo that they exist, any different from the City's duty to the general public?

The answer is that these duties, if any, were no different than those owed to the public at large. The real issue in this case is that, at its own hands, the College had a flood. It claims the City had a duty to stop the flood by 3:20 p.m., as opposed to by 8:30 p.m. Any

such duty, if there is one, is indistinguishable from a duty owed to the public at large.

III

THE TRIAL COURT ERRED IN RENDERING JUDGMENT IN FAVOR OF PLAINTIFF AND AGAINST DEFENDANT ON PLAINTIFF'S CLAIMS OF NEGLIGENCE BECAUSE THERE WAS NO EVIDENCE PRESENTED THAT DEFENDANT'S WATER DIVISION EMPLOYEES WHO RESPONDED TO THE SCENE WERE INADEQUATELY TRAINED OR EQUIPPED OR THAT THEY OR THE CITY PERFORMED ANY NEGLIGENT ACTS IN CONNECTION WITH THEIR RESPONSE AT THE SCENE, OR THAT SUCH TRAINING OR EQUIPMENT OR ACTS WERE THE PROXIMATE CAUSE OF CONTINUED FLOODING AT PLAINTIFF'S PROPERTY.

Assuming, arguendo, that Plaintiff could otherwise proceed with its claim against Defendant City for its alleged failure to properly train or equip its Water Division employees to locate and access Plaintiff's stop box or for other negligent acts in connection with its response at the scene, there was no substantial evidence presented in support of this claim in that Plaintiff failed to adduce any evidence as to what standard of care was required; that Defendant failed to meet that standard; or that any such failure was the proximate cause of Plaintiff's increased flood damage.

Plaintiff adduced absolutely no evidence as to Defendant City's requirements for an individual to become a Water Division employee, its training program for its employees, its testing program, its employee review procedures, supervision of employees, what

equipment it provides to its employees, the time in which a flood should be stopped, or anything else relating to the City's oversight of Water Division employees. The theory of Plaintiff's case was (1) Defendant's Water Division employees were unable to promptly determine the existence and location of Plaintiff's concealed stop box, hence (2) Defendant City was negligent in its training of those employees or in providing them with the proper equipment to perform their duties. For all the trial court or this Court knows, Defendant City might have the best training program in the world. No evidence was presented that it was anything less than that. It must be remembered that there are times when an employer's training and supervision of its employees is proper, employees are provided with the proper equipment to do their jobs, but injuries occur as a result of negligence by the employer's individual employees. Plaintiff presented absolutely nothing to the trial court to show that there was any shortcoming in the City's training and supervision of its employees.

Nor did Plaintiff allege that the individual Water Division employees who responded to the scene were negligent in any respect. However, had it done so, such a claim would have been subject to an official immunity defense, see, e.g., Green v. Denison, 738 S.W.2d 861, 865 (Mo. banc l987), which would have resulted in the failure to state a claim for respondeat superior liability against Defendant City. See, e.g., Peoples v. Conway, 897 S.W.2d 206, 208 (Mo. App. E.D. 1995); Jackson v. City of Wentzville, 844 S.W.2d 585, 589 (Mo. App. E.D. 1993). Faced with these legal obstacles, Plaintiff sought to assert a claim directly against the City for primary negligence in its alleged failure to train and equip its employees. But Plaintiff's evidence wholly failed to establish such a claim.

Therefore, to the extent that the trial court's judgment in this case was premised upon Plaintiff's claim of failure to train or equip Defendant City's Water Division employees, it must be reversed.

Similarly, although Plaintiff's petition set forth allegations concerning the adequacy of the quality of the drawings brought to the scene, as well as vague allegations concerning the need for City employees to attend to an unrelated water main break, Plaintiff presented no evidence of any duties or standards of care in connection with the City's response at the scene, nor any evidence of any breach of such duties or standards, nor any evidence that any such failure was the proximate cause of Plaintiff's increased flood damage. There simply is nothing in the record to indicate that the City or any of its employees could have or should have responded any differently than they did at the scene.

It is important to note that the Plaintiff possessed engineering drawings which showed the location of its water shut off valves. Unfortunately, and unwisely, the College chose to store its only copy of these drawings in the basement, an area inaccessible to it in the event of a pipe burst. This is akin to keeping one's only fire extinguisher behind the stove. If a grease fire occurs, then one has to call the fire department because its fire extinguisher is inaccessible. And then one blames the fire department for the delay in putting out the fire?

Finally, the College's claims of “delay” do not center around the time it took to break through 3"-6" of asphalt. Indeed, the College's own employees and its plumbing contractor accomplished this in a matter of minutes. (Stipulation ¶27, L.F. 39.) Rather, the

claims center around a delay in locating the stop box and valve. Yet the College had drawings showing the location; the College had installed the box and valve itself in that location; and the College itself did not locate the box and valve until 8:00 p.m. despite the fact that it had the superior knowledge of its whereabouts. There simply is no evidence that this inability to locate the valve was caused by the City's failure to train or equip its employees, or any other failure by the City at the scene. To the contrary, the City's equipment – the flow meter – is what finally aided in the location of the valve and box. Without the City's help in its emergency response capacity, the valve and box may not have been located within five hours of the pipe break.

IV

THE TRIAL COURT ERRED IN RENDERING JUDGMENT IN FAVOR OF PLAINTIFF AND AGAINST DEFENDANT CITY OF ST. LOUIS IN EXCESS OF $100,000.00 BECAUSE PLAINTIFF'S CLAIM, IF ANY, AROSE OUT OF THE ALLEGEDLY DEFECTIVE CONDITION OF DEFENDANT CITY'S PROPERTY, I.E., THAT PORTION OF OAKLAND AVENUE WHERE PLAINTIFF'S FIRE LINE STOP BOX WAS LOCATED, AND PURSUANT TO SECTION 537.610 R.S.MO. 1994, PLAINTIFF'S DAMAGES WERE LIMITED TO $100,000.00.

As mentioned previously, Plaintiff College has characterized its claim in a number of different ways, each time in an attempt to place the City's alleged duty in a category of a proprietary function. And, the trial court did not state on what basis, or for what particular acts or omissions, it found the City liable.

What this case boils down to is the delay in stopping Plaintiff College's flood. Because Plaintiff College failed to show liability on the City's part for any acts or omissions at the scene, see Point III above, it must be basing liability on the 1987 "concealment" of its stop box and valve. But Plaintiff College has not wanted to focus its claim in this manner because to do so would limit it to recovery of $100,000, if not make the City completely immune. Instead, Plaintiff has characterized this particular act as "maintaining access" to its box and valves. But what, if any, act or omission on the City's part led to the lack of access? The maintaining of Oakland Avenue in such a condition that it concealed the location of Plaintiff's stop box containing Plaintiff's fire line shut off valve.

In its petition, Plaintiff alleged that Defendant City was negligent in paving over the College's stop box at the time of the 1987 repaving of Oakland Avenue. (Petition, ¶15, L.F. 13). In substance, Plaintiff claimed that Defendant City's employees negligently created a dangerous condition of public property, i.e., the City's street. But by the time the case was submitted to the trial court, Plaintiff sought to change the focus of its contentions away from the condition of Defendant's street. Plaintiff did so to avoid the damage cap of §537.610 R.S.Mo. 1994, which would have limited its damages to $100,000.00.[4] The trial court erred in permitting Plaintiff to evade this statutory limitation on damages.

Plaintiff contends that a delay in locating and accessing the shut off valve for its fire supply line caused all of the flooding after 3:20 p.m., the time at which the College had successfully closed all of its other valves. What allegedly caused that delay? The fact that the City's Street Department paved over the manhole cover permitting access to this shut off valve. Had the City's property, i.e., the street, not been in the condition it was in - with asphalt covering the manhole cover - Plaintiff, by its own contentions, would never have suffered the injury for which it brought this suit. In fact, had the pavement not been concealing the shut off valve, the College never even would have requested the Water

[4]Effective January 1, 2000, the damage cap has been increased to $300,000.00 for injuries which occurred on or after that date. See §537.615 R.S.Mo. 2000.

Division employees to come to the scene. Instead, because the shut-off valve was concealed by the pavement (and also presumably because the College's engineering drawings were inaccessible to it), the College asked the Water Division to assist it in its efforts to stop its flood.

In Williams v. Mo. Hwy. & Transp. Com'n., 16 S.W.3d 605 (Mo. App. W.D. 2000), the Plaintiffs alleged that Defendant Highway Commission had allowed a dangerous condition of public property to exist when the lights were not working at the intersection where Plaintiffs' vehicle was struck by an uninsured motorist. The Court held that Plaintiffs properly plead a dangerous condition exception to sovereign immunity because they alleged (1) a dangerous condition of a public entity's property, (2) injury directly resulting therefrom, (3) that the dangerous condition created a reasonably foreseeable risk of the kind of harm that occurred, and (4) a public employee negligently created the condition or the entity had actual or constructive knowledge of its existence. 16 S.W.3d at 610, citing State ex rel Mo. Hwy. & Transp. Com'n. v. Dierker, 961 S.W.2d 58, 60 (Mo. banc 1998). A dangerous condition may exist by "the positioning of various items of property." Alexander v. State, 756 S.W.2d 539, 542 (Mo. banc 1988).

In the present case, Plaintiff brought a similar claim for the dangerous condition of Oakland Avenue as a result of the 1987 repaving. Oakland Avenue belongs to Defendant City. Plaintiff alleged that the condition of having its manhole cover for its fire line stop box concealed beneath the asphalt constituted a dangerous condition. It chose not to pursue this claim in the parties' stipulation submitted to the trial court, but instead attempted to

submit its case as one involving only a proprietary function in an attempt to avoid the statutory damage limitation of §537.610 R.S.Mo. But it cannot evade this limitation. Where a statutory waiver applies, it is unnecessary to employ the governmental/proprietary test. Wollard v. City of Kansas City, 831 S.W.2d 200, 203 (Mo. banc 1992). This Court in Wollard held that where a Plaintiff's claim arises out of the dangerous condition of a public entity's property used in the Defendant's proprietary capacity - in that case, the City of Kansas City's Water Department - the damage limitation of §537.610.2 R.S.Mo. applies.

V

THE TRIAL COURT ERRED IN RENDERING JUDGMENT AGAINST DEFENDANT FOR THE FULL AMOUNT OF PLAINTIFF'S DAMAGES AND NOT APPORTIONING FAULT BETWEEN THE PARTIES IN THIS CASE BECAUSE THE FACTS AS STIPULATED DEMONSTRATED AS A MATTER OF LAW THAT PLAINTIFF WAS GUILTY OF CONTRIBUTORY NEGLIGENCE IN THAT RUPTURE OF THE COLLEGE'S OWN WATER SERVICE LINE WAS A PROXIMATE CAUSE OF ITS DAMAGE AND IN THAT THE COLLEGE HAD A DUTY UNDER SECTION 23.12.010 OF THE CITY ORDINANCES TO RAISE THE LEVEL OF ITS FIRE LINE VALVE BOX TO THE GRADE OF THE STREET AT THE TIME OF THE 1987 REPAVING OF OAKLAND AVENUE BUT FAILED TO DO SO.

First, it is important to remember that the rupture of the College's own water line, on its own property, is what caused the flood. The City in no way contributed to the primary

cause of the water damage – the pipe rupture. Then, Plaintiff attempts to create a separate cause of action and duty for flooding that occurred from 3:25 p.m. to 8:30 p.m. While the number of gallons of water that escaped through the Plaintiff's ruptured pipe during that time may be identifiable, and that water volume traceable to certain damages, that does not change what was the proximate cause of those damages in the first instance – the pipe rupture.

And, as to the cause for the "delay" in stopping the water flow, the record in this case establishes clearly that Plaintiff was itself negligent in failing to comply with the provisions of §23.12.010 of the City Ordinances which required it - Plaintiff College - to make sure that its stop box was raised to grade at the time of the 1987 repaving. The trial judge below did not address Defendant's contention that Plaintiff was guilty of negligence and that the trial court should apportion fault. As part of the stipulation submitted to the trial court, the parties agreed that if the court found that both Defendant City and Plaintiff College were negligent, then the court must apportion damages. (Stipulation, ¶7, L.F. 32). To the extent that the trial court's silence may be viewed as an implicit finding that Plaintiff was not negligent, such a finding is clearly erroneous.

The facts that establish Plaintiff's negligence in this case were stipulated by Plaintiff: it failed to comply with the ordinance requirement, §23.12.010 of the Revised Code (Stipulation, ¶18, L.F. 35), that it raise the grade of its stop box to street level at the time of the 1987 repaving or any time thereafter. (Stipulation, ¶14, L.F. 34). Violation of a

municipal ordinance is negligence per se where the violation was the proximate cause of the injury. Downing v. Dixon, 313 S.W.2d 644, 650 (Mo. 1958); Sirna v. APC Building Corp., 730 S.W.2d 561, 566 (Mo. App. W.D. 1987). Plaintiff had a duty with which it failed to comply. Had it done so, the action for which Plaintiff sought damages below never would have occurred: its stop box would have been readily visible and, presumably, its employees would have shut off the fire line valve promptly instead of hours later. Plaintiff's employees would never have had to call Defendant City's Water Division employees to assist them in locating, accessing and shutting off Plaintiff's fire line shut off valve. Had Plaintiff performed its duty, there never would have arisen (if it did thereafter) any duty upon the City to raise and/or mark the location of Plaintiff's stop box. Further, even assuming Defendant City was negligent in its training of Water Division employees, Plaintiff would never have been injured by that failure had it followed the dictates of the City's ordinance and avoided the situation presented by the concealed stop box. The Water Division's employees would never have been called because Plaintiff's employees would have located the fire line stop box and closed the shut off valve just as they did with the supply line shut off valve. (Stipulation, ¶24, L.F. 37-38). According to the stipulation this would have been twenty (20) minutes after Plaintiff's fire line ruptured, and ten (10) minutes after it was discovered that water was entering the basement of the campus. (Id.).

Plaintiff's failure to abide the terms of §23.12.010 of the Revised Code is not the only manner in which it was negligent. It owned the fire line shutoff valve. (Stipulation, ¶10, L.F. 32-33). It was the College's duty to maintain such property. Plaintiff stipulated

that it never did so. (Stipulation, ¶22, L.F. 37). Plaintiff had in the basement of its building a copy of the same map that the City's Water Department employees brought to the scene, showing the existence and location of Plaintiff's fire line shut off valve. (Stipulation, ¶25, L.F. 38). But for a period of at least ten (10) years, from 1987 (or possibly earlier), up to the date of the flood in October, 1997, Plaintiff never performed any maintenance on its shut off valve or apparently even attempted to do so or keep track of its location. If it had, it would have discovered that the valve box permitting access to the shut off valve had been paved over.

Plaintiff's conduct presents a classic case of contributory negligence. Indeed, at no time in this case has Plaintiff ever contended that it was not under a duty to raise the stop box to grade level in 1987. Plaintiff stipulated that it did not in fact do so. Yet in its decision, the trial court fails to attribute any fault to Plaintiff as a result of this admitted failure to perform its clear obligation. This was clearly error.

In Gustafson v. Benda, 661 S.W.2d 11 (Mo. banc 1983), the Supreme Court adopted comparative fault as the law in Missouri. Under pure comparative fault as adopted in Gustafson, "any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery." Comparative Fault Act, §1(a), Gustafson, Appendix A, 661 S.W.2d at 18. Comparative fault is based upon principles of fairness. Rodriguez v. Suzuki Motor Co., 936 S.W.2d 104, 107 (Mo. banc 1996). The theory behind comparative negligence is to ensure that a Defendant is not forced to bear an unfair burden.

Patton by and through Menne v. Mayes, 954 S.W.2d 394, 395 (Mo. App. E.D. 1997). That is exactly what the judgment in the instant case does. Even though **all** of the damages for which Plaintiff sought recovery in this suit could have been avoided if it had complied with its legal requirements in 1987, the judgment in this case makes Defendant City totally responsible for all of Plaintiff's loss. Therefore, unless the judgment is reversed outright for the reasons set forth in points I, II, or III above, this Court should apportion the judgment rendered between the parties pursuant to Missouri Rule of Civil Procedure 84.14. Alternatively, this Court should be remand the case to the trial court with directions to determine such apportionment.

VI

THE TRIAL COURT ERRED IN RENDERING JUDGMENT IN FAVOR OF PLAINTIFF AND AGAINST DEFENDANT WHICH INCLUDED PREJUDGMENT INTEREST BECAUSE PLAINTIFF'S CLAIM WAS FOUNDED ON THE TORT OF NEGLIGENCE AND AS A GENERAL RULE, MISSOURI LAW DOES NOT AUTHORIZE AN AWARD OF PREJUDGMENT INTEREST IN TORT CASES AND PLAINTIFF DID NOT COME UNDER ANY EXCEPTION TO THAT GENERAL RULE IN THAT (1) PLAINTIFF FAILED TO SHOW THAT DEFENDANT'S CONDUCT CONFERRED A BENEFIT UPON DEFENDANT AND (2) PLAINTIFF DID NOT COMPLY WITH THE STATUTORY REQUIREMENTS OF SECTION 408.040(2) R.S.MO. SO AS TO BE ENTITLED TO PREJUDGMENT INTEREST IN THIS CASE IN THAT IT FAILED TO MAKE A WRITTEN SETTLEMENT OFFER, IN A CERTAIN OR READILY ASCERTAINABLE AMOUNT, BY CERTIFIED MAIL.

In its judgment and order, the trial court awarded Plaintiff the sum of $2,434,596.30 in interest from October 23, 1997 (the date of the incident) to the date of the court's judgment below. (L.F. 56). The award of prejudgment interest in a case such as this is clearly improper. In its judgment and order, the trial court determined that the amount of damages in this case was liquidated because the parties had stipulated that if the Defendant City was found liable, Plaintiff's damages would be $5,825,161. (L.F. 55). The court cited Ehrle v. Bank Bldg. & Equip. Corp. of America, 530 S.W.2d 482 (Mo. App. 1975) and

Sharaga v. Auto Owners Mut. Ins. Co., 831 S.W.2d 248 (Mo. App. W.D. 1992) in support of its holding that prejudgment interest was proper in this case. However, both of those cases were contract, not tort, cases. Ehrle involved an employee's claim of entitlement to benefits under an employer-sponsored disability program, i.e., a contract. Sharaga was a claim by an insured against his insurer for coverage for a fire loss under the parties' insurance contract. Neither of those cases supports the award of prejudgment interest in the present case. Plaintiff's petition in this case sought damages against Defendant City based upon the City's alleged negligence (L.F. 10-16), i.e., a tort action. The general rule in Missouri is that prejudgment interest is not allowed in tort cases. Emery v. Wal-Mart Stores, Inc., 976 S.W.2d 439, 449 (Mo. banc 1998); Sanders v. Hartville Mill. Co., 14 S.W.3d 188, 214 (Mo. App. S.D. 2000); Ritter Landscaping, Inc. v. Meeks, 950 S.W.2d 495, 496 (Mo. App. E.D. 1997); Vogel v. A.G. Edwards & Sons, Inc., 801 S.W.2d 746, 757 (Mo. App. E.D. 1990). An exception to this general rule has been recognized by the courts where the Defendant's conduct confers a benefit upon the Defendant. Vogel, 801 S.W.2d at 757; Ritter Landscaping, Inc., 950 S.W.2d at 496. Thus, in Vogel, where the tortious conduct involved a breach of fiduciary duty by "churning", i.e., excessive trading which resulted in extra commissions being paid to the Defendant broker, the Court held that there was a benefit to the Defendant from the tortious conduct which warranted an award of prejudgment interest. 950 S.W.2d at 757. But in Ritter Landscaping v. Meeks, where the Defendant insurance broker failed to procure flood insurance for the Plaintiff's business which later flooded, this Court held that the Plaintiff was not entitled to prejudgment

interest on its negligence and misrepresentation claims because the Defendant did not benefit from his failure to procure such insurance for the Plaintiff. 950 S.W.2d at 497. In the present case there was no clearly no benefit to Defendant City from the allegedly tortious conduct. The tort alleged here was negligence, plain and simple.

Missouri law also permits an award of prejudgment interest in tort cases where the Plaintiff has complied with the statutory requirements of Section 408.040(2) R.S.Mo. which provides:

> In tort actions, if a claimant has made a demand for payment of a claim or an offer of settlement of a claim, to the party, parties or their representatives and the amount of the judgment or order exceeds the demand for payment or offer of settlement, prejudgment interest, at the rate specified in subsection 1 of this section [9%], shall be calculated from a date sixty days after the demand or offer was made, or from the date the demand or offer was rejected without counter offer, whichever is earlier. Any such demand or offer shall be made in writing and sent by certified mail and shall be left open for sixty days unless rejected earlier. Nothing contained herein shall limit the right of a claimant, in actions other than tort actions, to recover prejudgment interest as otherwise provided by law or contract.

In order to be entitled to prejudgment interest in this case, it was incumbent upon Plaintiff to comply strictly with the requirements of Section 408.040 R.S.Mo. See, e.g., Emery v. Wal-Mart Stores, Inc., 976 S.W.2d at 449-450; Sanders v. Hartville Mill. Co., 14

S.W.3d 188 (Mo. App. S.D. 2000) (Plaintiff failed to establish his right to prejudgment interest in a tort action where the settlement offer which was less than the amount of the judgment was sent to the Defendant by regular mail instead of certified mail as required by statute); Boehm v. Reed, 14 S.W.3d 149, 151 (Mo. App. W.D. 2000)(where settlement offer required payment within 30 days, offer did not comply with statutory requirement that offer remain open for 60 days.). The amount of the demand must be certain in amount or at least readily ascertainable. Brown v. Donham, 900 S.W.2d 630, 633 (Mo. banc 1995).

In Brown v. Donham, supra, the Plaintiff's attorney sent a demand letter to the Defendant's insurer demanding the "policy limits" of the Defendant's coverage. The Defendant's limits were $100,000/$200,000, but the accident in which the Plaintiff was injured also involved two other parties who made claims against the Defendant's policy. Further, in his demand letter, counsel for the Plaintiff also requested that his client be paid the policy limits of "all insurance coverages that apply", apparently referring to both medical payments coverage and the possibility of stacking coverage under multiple policies. 900 S.W.2d at 634. The Supreme Court reversed the trial court's award of prejudgment interest to the Plaintiff, holding that this type of demand or offer of settlement was ambiguous and would not support an award of prejudgment interest under the statute. Id.

There is nothing in the record in the present case that establishes that Plaintiff ever sent a settlement proposal to Defendant City, the amount of which was exceeded by the trial court's judgment, or that any such offer, if sent, was sent by certified mail or was extant for

any period of time. Hence, there is simply no basis in the law for the award of prejudgment interest in this case.

Nor in this case could Plaintiff's petition even be considered a demand made in compliance with the statute. Even if the certified mail requirement could be ignored, the petition itself would not meet the requirement that the demand be in a specified amount, or be reasonably capable of ascertainment. In its petition, Plaintiff fails to set forth any specific amount claimed as damages other than an amount "in excess of $5 million" (Petition, ¶¶16, 21, 25; L.F. 13, 14, 16) and an amount "in excess of $25,000.00." (prayer for relief, counts I, II, III; L.F. 13, 14, 16). As was the case in Brown v. Donham, supra, this type of demand set forth in a petition does not supply the specificity required to constitute a valid offer of settlement under the statute. 900 S.W.2d at 634.

What the trial court failed to appreciate is that the stipulation as to damages was just that: an agreement as to what the trial court should consider them to be, not what they necessarily were in fact. Parties enter into stipulations for various reasons: because something is unquestionably a fact; because an issue, like damages, may be subject to various outcomes, and the parties prefer certainty over uncertainty; or the parties may simply want to avoid the cost of establishing a fact, like damages, and are willing to come to an agreement on an amount to avoid litigating the issue altogether. In this case, the damage issue was arrived at by stipulation only after discovery was taken in the case. Had the damage issue been tried, perhaps Plaintiff would have asserted a higher figure. Defendant most certainly would have argued for a lower sum. But the parties compromised on their

positions instead.

Courts have historically favored resolution of issues by agreement of the parties. Howard v. Mo. State Bd. of Educ., 847 S.W.2d 187, 190 (Mo. App. 1993), appeal after remand, 913 S.W.2d 887 (Mo. App. 1995). In this case, Plaintiff and the trial court seek to penalize Defendant City for resolving by agreement an issue that could have been contested and which would have required an extensive amount of the trial court's and the parties' time. The lesson that defendants in future litigation will take from this case is to never stipulate to damages, because to do so is to agree to pay prejudgment interest where none would be due if the Defendant simply forced the Plaintiff to put on evidence 5of its damages. It does not matter that there may be no real dispute. A defendant must make it one. This would be bad policy, and would signal a marked change in the existing law - that a Plaintiff in a tort action is generally not entitled to prejudgment interest. Defendant City should not be penalized in this case for simplifying the issues submitted to the trial court for decision.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment below and enter judgment for Defendant City of St. Louis or, in the alternative, render a new judgment that (1) limits Defendant City's damages to the $100,000.00 limit set by §537.610 R.S.Mo; (2) apportions damages between the parties; and (3) omits any amount of prejudgment interest to be awarded to Plaintiff.

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CERTIFICATE Of COMPLIANCE WITH RULE 84.06(C)

The undersigned counsel of record hereby certifies that:

1. Counsel for Appellant City of St. Louis are Patricia A. Hageman, MBE #43508, 314 City Hall, St. Louis, Mo. 63103, (314) 622-3361.

2. The Brief to which this certificate is attached complies with the limitations contained in Rule 84.06(b).

3. The Brief contains 13,158 words in WordPerfect 8.0 format.

_____

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the foregoing were mailed this _____day of October, 2003, to Martin M. Green, Attorney for Respondent, 7733 Forsyth, Suite 700, St. Louis, Mo. 63105.

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